84-1224

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Does it violate the *ex post facto* clause of the United States Constitution to apply a newly amended death penalty statute as a basis for resentencing to death a defendant whose original death sentence was vacated under circumstances where the defendant would have received a life sentence under the law in effect when he was tried?

2. Is the equal protection clause of the United States Constitution violated when defendant receives a death sentence that, but for the state's conscious delay in confessing error, would have been reduced to the life sentence that similarly situated defendants received?

3. Are a defendant's due process rights violated by a jury instruction that a sentence of life imprisonment must be reached unanimously when the state's death penalty statute specifically requires a unanimous vote solely for the death penalty but not for life imprisonment?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner Wilbert Lee Evans prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case.

OPINIONS BELOW

The Supreme Court of Virginia affirmed the death sentence of Wilbert Lee Evans after the trial court decided to permit resentencing after Evans' original death penalty was vacated (*Evans II*). The opinion, which is unreported, is set forth in the Appendix ("App.") at 1a-15a. The trial court's order sentencing Evans to death is set forth at App. 16a-18a. The trial court's order that Evans was to be resentenced, and that resentencing was not unconstitutional, is set forth at App. 19a-21a. The Supreme Court of Virginia's opinion affirming Evans' conviction and his initial death sentence (*Evans I*) is set forth at App. 24-39.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article I, § 10, cl. 1 provides:

> No state shall . . . pass any Bill of Attainder [or] ex post facto Law.

Amendment XIV, § 1 provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code § 17-110.1 provides:

§ 17-110.1(A) *Review of death sentence*

> A sentence of death . . . shall be reviewed on the record by the Supreme Court.

§ 17-110.1(C)(2)

> In addition to consideration of errors in the trial enumerated by appeal, the court shall consider and determine:
>
> > . . . Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

§ 17-110.1(D)

> In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:
>
> 1. Affirm the sentence of death; or
>
> 2. Commute the sentence of death to imprisonment for life.

Virginia Code § 19.2-264.3 provides:

§ 19.2-264.3 *Procedure for trial by jury*

> A. In any case in which the offense may be punishable by death which is tried before a jury, the court shall first submit to the jury the issue of guilt or innocence . . . .
>
> C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . . .
>
> If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

Virginia Code § 19.2-264.4 provides:

§ 19.2-264.4(D) *Sentence proceeding*

> The verdict of the jury shall be in writing, and in one of the following forms:
>
> "(1) We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, *unanimously fix his punishment at death.*
>
> Signed ———————————— Foreman"
>
> or
>
> (2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, *fix his punishment at imprisonment for life.*
>
> Signed ———————————— Foreman"

STATEMENT OF THE CASE

Wilbert Evans was convicted of capital murder in April 1981, for the shooting of an Alexandria, Virginia, Deputy Sheriff.[1] He was sentenced to death on June 1, 1981, in the sentencing phase of his bifurcated trial. Evans' sentence of death was affirmed by the Virginia Supreme Court on December 4, 1981. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1058 (1982) (*Evans I*). App. 24a-39a. Several days before his scheduled execution, he filed a Petition for a Writ of Habeas Corpus in state court in which he claimed that Respondent had knowingly presented to the jury inaccurate and seriously misleading evidence concerning Evans' prior criminal record.[2] On April 12, 1983, after delaying for almost one year, the Attorney General for the Commonwealth of Virginia conceded that the sentencing was constitutionally infirm and that Evans' death sentence therefore must be vacated. App. 22a. For that reason, the trial court granted portions of the habeas petition and set aside Evans' death sentence on May 2, 1983. App. 22a-23a.

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[1] The shooting occurred as Evans was being returned to jail after a court appearance and as he struggled with the deputy in an attempt to escape. Evans has always contended that he never intended to kill the deputy, but that the gun fired during the struggle as he attempted to shoot the handcuffs from his wrists. App. 29a.

[2] Evans filed his habeas corpus petition on April 9, 1982 and amended it on May 5, 1982. In the amended petition Evans explicitly stated that certain purported "convictions" used by Respondent to prove Evans' dangerousness had not, in fact, occurred. *See infra* at 7. On July 7, 1982, Evans filed a bill of particulars which discussed in detail the problems with the purported "convictions." On December 29, 1982, Evans filed a second amended petition in which he stated, as well, that most of the convictions Respondent introduced at trial had been obtained without benefit of defense counsel and were therefore inadmissible at the sentencing proceeding. *See* note 21, *infra*.

The timing of the confession of error proved to be critical. During the pendency of Evans' initial appeal from his conviction, the Virginia Supreme Court had ruled that the proper remedy when a death sentence is vacated because of error at the sentencing stage was the imposition of a life sentence. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).[3] Although since May 1982 Evans had been requesting his death sentence to be set aside due to use of the purported "convictions," it was not until February 22, 1983, that counsel for Respondent indicated for the first time in an "off-the-record" conversation that Respondent would likely concede error in the case. App. 72a. On that date, the amended death penalty legislation, proposed by Respondent, passed the Virginia Senate on an emergency basis. On March 28, 1983, just two weeks prior to the state's formal concession of error, the Governor had signed into effect as emergency legislation the amendment to the Virginia Code which overruled *Patterson* and allowed for re-sentencings before a new jury where the original sentence of death had been set aside because of errors at the sentencing stage. Virginia Code, § 19.2-264(3)(C), App. 3a.

Thereafter, Respondent gave notice that it would seek the death sentence once again for Evans. Evans objected, claiming that to apply the new law retroactively to him would be a violation of the proscription in the United

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[3] The law in Virginia at that time required the same jury to decide both guilt or innocence and sentencing in capital cases. Virginia Code § 19.2-264.3. In *Patterson* the court reasoned that an improperly selected jury could not be reimpaneled if the death sentence it reached were vacated. Because the state statute permitted the state high court only two options—affirm a death sentence or commute to life—and because error in the jury selection precluded affirmance of the sentence, the only lawful action was to commute the sentence to life. 222 Va. at 660, 283 S.E.2d at 216.

States Constitution against *ex post facto* laws.[4] Evans also claimed that Respondent should be barred from seeking to resentence him because the original sentence of death had been obtained by gross prosecutorial misconduct—the knowing use of false conviction records to obtain the death penalty.[5] Finally, Evans claimed that Respondent had purposely delayed confessing error in his case for almost one year while it sought on an emergency basis, and obtained, the amendments to the death penalty laws described above. This delay deprived him of the right, under the prior law, to a sentence of life.[6]

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[4] U.S. Const. art. I, § 10, cl. 1. The preference against retrospective laws is incorporated in Virginia statutory law as well as in the state constitution. *See* Virginia Code § 1-16 (no new law shall be construed to repeal or affect in any way any right accrued under former law). "Statutes are prospective in the absence of an express provision by the legislature." *Washington v. Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975). "A contrary rule might encourage dilatory tactics and procrastination which would hamper the judicial process." *Ruplenas v. Commonwealth*, 221 Va. 972, 978, 275 S.E. 2d 628 (1981). The amended death penalty statute at issue in the present case contains no reference to retroactivity. *See* Virginia Code § 19.2-264.3.

[5] A hearing on these claims revealed that, contrary to the assertions by the Attorney General that no counsel for Respondent knew of the false records prior to trial, in fact the prosecutor at Evans' original trial *had known* at that time that the purported convictions he used against Evans were invalid. App. 9a.

[6] The decision to confess error was made known to Evans' counsel on the very day the new law was signed into effect. App. 73a. The Assistant Attorney General who was handling Evans' habeas petition, and who made the decision to confess error, was the same Assistant who had responsibility in the Attorney General's office of accomplishing the task of securing on an emergency basis legislative enactment of the amendments to the death penalty laws. Respondent claims it was a mere coincidence that the confession of error, almost two years after the knowing misuse of the purported "convictions" and almost one year after Evans first challenged Respondent about its misconduct, was made only two weeks after the law changed. *See* App. 10a.

The prosecutor admitted that at least one month prior to the trial, he learned that one of the purported convictions had been appealed and *nolle prossed* at a trial *de novo*.[7] Nevertheless, he introduced the abstract of the lower court conviction at the sentencing phase of the trial. Another purported conviction was one which had likewise been appealed *de novo*, resulting in a reconviction. Both abstracts were introduced in a manner clearly designed to lead the jury to believe that in fact there had been two separate crimes. The prosecutor also admitted that despite his knowledge of these flaws, he did not tell the defense attorneys anything about the errors in the records until after Evans had been found guilty and until after the evidence had been presented at his sentencing.[8]

Events prior to the hearing supported the conclusion that the prosecutor had not disclosed the facts. Still represented by his trial counsel, Evans took an automatic appeal of his conviction to the Virginia Supreme Court. By the terms of Virginia Code § 17-110.1(C), the court had an independent duty to review the sentence of death and to weigh its appropriateness. In urging the court to uphold the death sentence, Respondent listed and again

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[7] App. 50a. North Carolina, the site of the charge at issue, employs a two-tier system for the trial of misdemeanors, the second tier consisting of a trial *de novo*. The defendant, if convicted at the first tier, has an appeal of right to the superior court, and "in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose." *State v. Bryant*, 181 S.E.2d 211, 212 (N.C. 1971).

[8] App. 52a. The prosecutor gave inherently incredible testimony that he believed it was a matter of defense strategy to permit Respondent to introduce the nonexistent "convictions." App. 57a. Defense counsel vehemently denied ever being told about the errors in the conviction records and insisted that had they known, they never would have allowed the records to be presented to the jury. App. 64a-65a, 67a, 69a.

relied on all of the invalid "convictions" offered into evidence at trial. App. 41a-42a. The same recitation was later included in Respondent's brief in opposition to Petitioner's earlier Petition For A Writ Of Certiorari to the United States Supreme Court. App. 45a-46a. Certiorari was denied. 455 U.S. 1038 (1982). The Virginia Supreme Court upheld the sentence of death, placing specific reliance upon several of the nonexistent "convictions."[9]

At the hearing on resentencing, there was little dispute by Respondent that had the Virginia Supreme Court been told at the time it considered Evans' appeal that the records the jury had received were false, it would have set aside his death sentence and replaced it with a sentence of life, just as it had done in the *Patterson* case, decided just six weeks prior to *Evans I*. Nevertheless, the trial court, over Evans' objection, ruled that resentencing could proceed before a new jury. App. 19a-20a. The new jury was not presented with live testimony concerning the circumstances of the crime. Instead, it was read portions of the transcript of the guilt-or-innocence phase of Evans' original trial, and was presented with other, live, sentencing evidence. Once again, a sentence of death was imposed, based solely upon the jury's determination of Evans' future dangerousness.[10]

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[9] *See* App. 31a (alluding to the assault that was *nolle prossed.*) One of Evans' counsel testified at the hearing on resentencing that had he known of the false records, he would have made a specific objection before the trial court and would have protested Respondent's reliance on the false evidence on appeal. App. 67a.

[10] Five months later Evans was involved in an event that cast severe doubt on the jury's conclusion. In May 1984, six death row inmates escaped from Mecklenberg Correctional Center (where Evans was incarcerated), after holding fourteen prison guards hostage. Despite extreme pressure to join the escape, or simply to yield to events, Evans prevented violence and helped those who had been taken hostage. Though unarmed, he placed himself between the heavily armed escapees and the hostages, intervening on the hostages' behalf, urging the escapees to remain calm and nonviolent,

Evans appealed to the Supreme Court of Virginia. *Evans v. Commonwealth*, No. 840474, slip op. (Va. November 30, 1984). App. 1a-15a. The court referred to the "indifferent, careless manner" with which the prosecutor introduced Evans' prior "convictions" and that the prosecutor "admitted he knew, at the time the conviction records were proferred during the trial, that three of the purported convictions actually were only one." App. 8a-9a. The court concluded that "if the prosecutor knew they were inaccurate in any particular," which the court found was so, "the documents should not have been offered in evidence." App. 9a. Nevertheless, because Evans had been given a new sentencing hearing, the court ruled that the harm had been cured, and his death sentence was affirmed.

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT MISAPPLIED *DOBBERT v. FLORIDA* AND IGNORED OTHER PRECEDENT IN REJECTING PETITIONER'S *EX POST FACTO* CLAIMS.

In upholding petitioner's sentence of death, the Virginia Supreme Court took bits and pieces from *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Weaver v. Graham*, 450 U.S. 24 (1981), applied them incorrectly, and reached a result not warranted by either case. As other states struggle in the coming years with their re-drafted death penalty statutes, particularly with the effects of retroactivity and the *ex post facto* clause, they will need authoritative word from this Court to avoid the plainly incorrect result reached below.

Under the law as it existed at the time Evans committed his offense, at the time he was tried, at the time his conviction was affirmed (*Evans I*), and at the time Respondent first indicated it would concede the invalidity

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and helping the hostages when he could. The fourteen hostages credit Evans with saving their lives, and one female hostage credits him with preventing her rape. App. 75a-80a.

of his death sentence one and a half years later, Evans was entitled, upon the setting aside of his death sentence, to a sentence of life. That action was mandated by Virginia Code § 19.2-264.3, and by *Patterson v. Commonwealth*,[11] decided just six weeks before *Evans I*.[12]

Manifestly, had the errors which led Respondent to concede the invalidity of Evans' sentence in 1983 been brought to the attention of the Virginia Supreme Court when it first considered his appeal, the court would have done precisely what it had done in *Patterson* just six weeks before and commuted his sentence to life. Instead, because Respondent presented to the Virginia Supreme Court, as well as to this Court, evidence which Respondent knew to be false, the errors did not come to light. Now, because Respondent was able to cause the legislature, on an emergency basis, to amend § 19.2-264.3, Evans again awaits an execution approved by the Virginia Supreme Court.

This result stands in stark contrast to that reached in *Dobbert v. Florida*,[13] upon which the Virginia Supreme Court placed so much reliance. In fact, petitioner has found no case that supports the result reached by the court below in which the statutory sentencing scheme in

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[11] 222 Va. 653, 283 S.E.2d 212 (1981).

[12] Before the amendment on March 28, 1983, Virginia Code § 19.2-264.3, "Procedure for Trial by Jury," stated, in pertinent part:

> "C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

In *Patterson*, the Virginia Supreme Court read this provision to require that where a sentence of death was vacated due to error at the sentencing stage such as to preclude the same jury from rehearing the case, the defendant was to automatically receive a sentence of life. 222 Va. at 660, 283 S.E.2d at 216.

[13] 432 U.S. 282 (1977).

place at the time of trial was replaced by a more severe scheme almost two years later, and then applied retroactively.

In *Dobbert*, this Court found the change in the Florida law was not an *ex post facto* change, but "procedural, and on the whole ameliorative." 432 U.S. at 292. The change was deemed to be procedural since "there was no change in the quantum of punishment attached to the crime." 432 U.S. at 294. It was deemed to be ameliorative because it provided new protections to the accused at the sentencing stage. 432 U.S. at 294-97.

In contrast, here the change effected by the 1983 emergency amendment to Virginia's death penalty statute was neither procedural nor ameliorative, but a decided abandonment of the principles embodied in the *ex post facto* clause. First, this was no mere procedural change, even though it was paraded in procedural garb.[14] Rather, the change worked by the amendment deprived Evans of the substantial right which existed prior thereto to have the same jury which heard the facts of his trial decide his fate.

This explicit right, embodied in Virginia Code § 19.2-264.3, was a recognition that citizens who were asked to decide if a defendant should live or die must be intimately familiar with the facts of the offense. It was a reflection of the notions underlying cases such as *Gregg v. Georgia*, 428 U.S. 153 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Lockett v. Ohio*, 438 U.S. 586

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[14] *See Weaver v. Graham*, 450 U.S. 24, 29 n.1 (1981) ("Alteration of a substantial right is not merely procedural even if the statute takes a seemingly procedural form."). Truly procedural changes are, for example, laws which provide for separate trials for co-defendants, *Beazell v. Ohio*, 269 U.S. 167 (1925); laws enlarging the class of people who can testify, *Hopt v. Utah*, 110 U.S. 576 (1884); laws changing the place of trial, *Gut v. State*, 76 U.S. 35 (1870); laws abolishing courts and creating new ones, *Duncan v. Missouri*, 152 U.S. 377 (1894); and laws changing the qualifications of grand jurors, *Gibson v. Mississippi*, 162 U.S. 565 (1896).

(1978), that "an individualized decision is essential in capital cases" [15] and that the sentencing jury must be presented with all relevant sentencing information. It was also a departure from the prior practice in Virginia in which sentencing juries were not necessarily those which heard the guilt stage.[16] The jury that heard Evans' trial had the opportunity to hear, firsthand, the inmates who testified that Evans had planned the escape the night before. The attack on their credibility was pivotal for the defense. In contrast, the jurors who sentenced Evans to death heard only the transcript of that testimony. They had no basis to weigh the words, or to judge credibility in this crucial area by viewing the demeanor of the witnesses on the stand.

Of course, this right was a statutory right, and the legislature that enacted it certainly had the power to repeal it. But since the law requiring the same jury to decide guilt-or-innocence and whether to mete out the death penalty was in place at all pertinent times during Evans' prosecution, he was entitled to its benefit. The amended law, coming into effect after his trial and sentencing, should not have been held applicable. In *Dobbert*, by contrast, "the new statute was in effect at the time of [Dobbert's] trial and sentence", which this Court considered dispositive. 432 U.S. at 301.

Secondly, the amended law can scarcely be called "ameliorative." The Virginia Supreme Court misread *Dobbert* in so concluding. Dobbert was given a panoply of new rights by the amended statute, including independent reviews by both the trial judge and the appeals court. The fact that the jury there recommended a life sentence which would have been mandatory under the old law, but

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[15] *Lockett v. Ohio*, 438 U.S. at 605.

[16] *See, e.g., Fogg v. Commonwealth*, 215 Va. 164, 207 S.E.2d 847 (1974); *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972); *Snider v. Cox*, 212 Va. 13, 181 S.E.2d 617 (1971).

which was rejected by the judge under the new law, was not controlling since "it cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life." 432 U.S. at 294. In stark contrast, it can be said with *absolute* assurance that had Respondent disclosed to the Virginia Supreme Court the errors in Evans' case, Evans would have received a life sentence under the old statute.

The court below thus fashioned a way to save Evans' death sentence which contravenes the notions of fairness embodied in the *ex post facto* clause and its ban on "arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981).[17]

The Virginia Supreme Court's analysis was faulty in another respect as well. In reaching its result, the court below seemed to rest on language in *Weaver* that "[c]ritical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and government restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. *Weaver v. Graham*, 450 U.S. 24, at 30 (1981)." App. 5a. Because Evans was on notice at the time of his crime that Virginia would seek the death penalty for the shooting of a law enforcement officer, the court reasoned that there was no *ex post facto* violation.

But that statement in *Weaver* was never intended to end the inquiry. It was the law of Virginia as enunciated

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[17] Indeed, the mere circumstance that Respondent prosecuted Evans, wanted to preserve the death sentence, delayed for almost one year in confessing error, and actively worked for passage of a statute on an emergency basis that affected Evans differently from anyone else (Evans was the only inmate on death row whose death sentence was set aside by virtue of Respondent's confession of error) suggests that the 1983 amendment should be considered a bill of attainder. U.S. Const. art. I, § 10, cl. 1. *Cf. United States v. Lovett*, 328 U.S. 303, 315 (1946).

later in *Patterson* that if his sentence of death was set aside, he was entitled to a sentence of life. The Virginia court's apparent formulation of the *ex post facto* inquiry completely ignored cases such as *Lindsey v. Washington*, 301 U.S. 397 (1937). There, the Court struck down as *ex post facto* a law which changed the sentence allowable for the crime of grand larceny from a maximum of 15 years to a mandatory 15 years. The Court noted that:

> "It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. . . . Removal of the possibility of a sentence of less than fifteen years, at the end of which the petitioners would be freed from further confinement and the tutelage of a parole revocation at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old."

301 U.S. at 401. By focusing solely on the maximum sentence for a capital offense, the Virginia court failed to recognize that a fundamental component of Evans' *ex post facto* claim was that he would automatically receive a life sentence under certain circumstances. This Court should hear this case to ensure that state and federal courts do not improperly use a characterization of a statute as procedural or ameliorative to foreclose "analysis or comparison of the practical operation of the two statutes," [18] which may indeed change substantive rights or increase potential punishment.

In the 14 years since *Furman v. Georgia*, 408 U.S. 328 (1972), the Court has written numerous opinions giving definition and dimension to the constitutional requirements governing the trial of death cases. Along the way, many death penalty statutes have been abandoned or amended. With each new decision, various states again

[18] 301 U.S. at 399-400.

undertake the process of enacting new death penalty statutes, or amending old ones, in an attempt to conform to evolving constitutional standards enunciated by the Court.

One of the serious problems that arises for each state undertaking to revamp its death penalty statute is the effect of each change on defendants whose cases have not yet reached final judgment as of the effective date of the new law. Problems also arise in those cases, such as the present one, where final judgment was entered long ago. This is apt to be a recurring problem as inmates whose death sentences were imposed several years ago are successful in collateral attacks on their convictions or sentences, and the states struggle with fashioning the proper remedy.

For example, the Florida and Pennsylvania Supreme Courts have held that a defendant who was convicted under a statute later declared to be unconstitutional may not be resentenced to death under a newly enacted death penalty statute, when, while his case was on appeal, all other defendants sentenced under the valid law were given sentences of life. *Lee v. State*, 340 S.2d 474 (Fla. 1976); *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981). The Virginia Supreme Court, on the other hand, has concluded that retrial under the new statute is appropriate.

The potential for attempts at new trials or sentencing proceedings under newly enacted death penalty provisions and the potential that defendants will be facing laws different than those in effect at the time of their crimes or their trials is great. There is, therefore, a substantial need for a clear statement from the Court concerning the reach of the *ex post facto* clause in such situations, where categorizing a law as procedural, or as substantive, will mean the difference between life and death.

II. SENTENCING PETITIONER TO DEATH WHEN, BUT FOR RESPONDENT'S CONSCIOUS DELAY IN CONFESSING ITS ERROR, PETITIONER WOULD HAVE RECEIVED THE LIFE SENTENCE THAT SIMILARLY SITUATED DEFENDANTS RECEIVED, VIOLATED THE EQUAL PROTECTION CLAUSE.

Evans was tried in April 1981 and sentenced to death on June 1, 1981. Evans appealed his conviction to the Virginia Supreme Court, which affirmed on December 4, 1981. Between his sentencing and the disposition of his appeal, a critical event occurred: On October 16, 1981, the Virginia Supreme Court held that vacating a defendant's death penalty (though affirming the conviction) necessitated reducing the sentence to life imprisonment.[19] Evans' death sentence ultimately was withdrawn when Respondent, after long, unwarranted delay, conceded that it had improperly used false records of convictions [20] and uncounseled convictions [21] at the sentencing phase of Evans' trial. Had Respondent confessed error immediately, rather than perpetuating it in its opposition to Evans' brief on appeal and to Evans' initial petition for a writ of certiorari, Evans and Patterson and any other defendant whose death penalty was vacated

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[19] In *Patterson v. Commonwealth*, 222 Va. 653, 657, 283 S.E.2d 212 (1981), the Virginia Supreme Court held that where a death sentence is vacated, though the conviction affirmed, the defendant must automatically receive life imprisonment. The court reasoned that under the law requiring the same jury to hear the merits and the sentencing phases of the trial, taint at the sentencing phase precluded re-impaneling the same jury. An automatic life sentence was thus the only lawful result. 222 Va. at 660, 283 S.E.2d at 216.

[20] It is, of course, beyond argument that the use of false or perjured evidence cannot support a criminal conviction. *Miller v. Pate*, 386 U.S. 1, 7 (1967).

[21] Prior convictions at which the defendant did not have counsel may not be used to enhance a defendant's sentence. *Burgett v. Illinois*, 466 U.S. 222 (1980); *Baldasar v. Texas*, 389 U.S. 109 (1967).

would have received equal treatment. They would have automatically received life sentences. The happenstance of timing and, indeed, Respondent's refusal to confess its undisputed error promptly, while Respondent actively sought to overrule *Patterson* legislatively on an emergency basis, should not be a basis for having one human die while another lives.

This Court has endorsed the view that in death penalty cases, state high courts should review each death sentence "to ensure that similar results are reached in similar cases." [22] In the present case, strikingly similar cases produced drastically different results. In *Patterson*, the accused was convicted of murder and received a death sentence. When the sentence (but not the conviction) was vacated, the Virginia Supreme Court held that the only permissible sentence under the circumstances was life imprisonment.[23] In the present case, which moved through the Virginia criminal courts virtually in tandem with *Patterson*, Evans was convicted and received a death sentence. His death sentence was flawed, however, by the prosecution's knowing introduction of improper convictions to prove Evans' dangerousness.[24] Had Respondent confessed its impropriety promptly to the Virginia Supreme Court in the course of Evans' appeal—in fact, Respondent exacerbated the error by emphasizing the

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[22] *Proffitt v. Florida*, 428 U.S. 242, 258 (1976), citing *State v. Dixon*, 283 So.2d 1, 10 (1973). *See* U.S. Const. amend. XIV, § 1. Virginia Code § 17-110.1(C)(2) directs the Virginia Supreme Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. . . ."

[23] *See* note 3, *supra*.

[24] Strikingly, less than one year after the jury concluded that Evans posed a danger to the community, he interceded during an escape of six inmates from Mecklenberg Correctional Center's death row and was credited with saving the lives of fourteen prison guard hostages. App. 75a-80a.

purported "convictions" as a basis for affirming the conviction (App. 41a-42a)—the Virginia Supreme Court would have indisputably vacated the sentence. Pursuant to *Patterson*, Evans would have automatically been resentenced to life imprisonment.[25]

In *Dobbert v. Florida*, 432 U.S. 282, this Court held that equal protection would not be denied in death penalty cases if a new law, in effect at the time of an accused's trial and sentence, were applied. The Virginia Supreme Court in the present case did not apply the law in effect at the time of Evans' trial but rather applied a law passed two years after his trial. The Virginia Supreme Court had previously acted to reduce from death to life imprisonment the sentence of a man who was tried and convicted, like Evans, two years before the new law was enacted. The consequence of the Virginia court's action was to misapply *Dobbert* and deny equal protection to Evans. This Court should not abide such a result.

Evans' death sentence turned on one fact: the refusal of Respondent to concede error until *Patterson* was overruled legislatively. Had Respondent conceded error immediately after knowingly using the purported "convictions" at the sentencing phase of Evans' trial, and certainly as soon as Evans' counsel had raised the issue of Respondent's knowing error in his state habeas corpus petition, Evans and Patterson would have been in the identical situation: tried and convicted and sentenced to death only to have their convictions reduced to life upon invalidation of their sentencing proceedings. Whatever rationality can be ascribed to Florida's system of line-drawing in *Dobbert*, it is irrational to draw a line be-

[25] In view of *Patterson*, automatic commutation in such situations became a part of Virginia's law just as surely as if it had been drafted by the legislature. *See Paulos v. New Hampshire*, 345 U.S. 395, 402 (1953); *Winters v. New York*, 333 U.S. 507, 514 (1948).

tween one defendant (Patterson), whose death sentence was reduced to life because the error in his sentencing proceeding was susceptible of recognition by the state high court, and another defendant (Evans), who received death because Respondent misled the state high court in connection with the defendant's sentencing proceeding.[26] Both classes of cases, in the words of *Dobbert*, had progressed "sufficiently far in the legal process to be governed solely by the old statute. . . ." 432 U.S. at 301. "[R]ather than permitting the present death penalty, *Dobbert* forbids it."[27]

Whether one inmate lives and another is put to death by the state should not rest on mere matters of timing or procedure. In *Lee v. State*, 340 So.2d 474 (Fla. 1976), a defendant was convicted of murder and sentenced to death. When the death penalty statute under which he was convicted was ruled unconstitutional, his sentence was reduced to life pursuant to his motion, an order that was appealed by the state. Meanwhile, the death sentences of all other death row inmates were reduced.[28] Pending the disposition of the appeal, the state legislature passed a death penalty statute that passed constitutional muster. Applying the new statute, the state appeals court reversed the order reducing the defendant's sentence and held that the new sentencing statute should apply. He received a death sentence again. The state supreme court, invoking the constitutional mandate

[26] *See Commonwealth v. Story*, 440 A.2d 488, 491-92 (Pa. 1981) (defendant tried, convicted, and sentenced in 1975 pursuant to death penalty statute declared unconstitutional while appeal pending; death penalty set aside but defendant reprosecuted under 1978 death penalty statute; held that new law not applicable so death penalty forbidden).

[27] *Commonwealth v. Story*, 440 A.2d at 492.

[28] Apparently all other death row inmates in Florida obtained reductions of their sentences in light of *Furman v. Georgia*, 408 U.S. 238 (1972). *See Lee v. State*, 340 So.2d at 475.

of equal protection, held that the sentence had to be reduced to life.[29] Had the defendant's attorney not initiated a motion to reduce his original death sentence, the court reasoned, his sentence would have been reduced to life along with all other death row inmates. Because the question of whether a person should live or die should not hinge on when he requested a reduction in his sentence, the sentence was reduced to life.[30]

The identical reasoning should apply here. Should the question of whether a person should live or be put to death by the state be determined by a combination of Respondent's first misleading the highest state court and then refusing for almost one year to admit its error? Had the Virginia Supreme Court been alerted to the flaws in Evans' sentencing proceeding, there is no doubt that his sentence would have been vacated and reduced to life. In these circumstances, it would deny Evans equal protection to subject him to the death penalty while Patterson, his equivalent in all significant respects,[31] is permitted to live. Because state courts are apparently apt to seize on inconsequential distinctions between defendants in death penalty cases, this Court should reiterate its position that, particularly when the state contemplates meting out the death penalty, similarly situated defendants must be treated equally.

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[29] 340 So. 2d at 475.

[30] *Id. See also Commonwealth v. Crenshaw*, 470 A.2d 451, 454-55 (Pa. 1983) (but for extraordinary delay of almost three years in bringing defendant to trial, trial would have been held prior to enactment of new death penalty statute; death sentence vacated).

[31] The Virginia Supreme Court considered Patterson distinguishable because his sentence was reduced before the effective date of the new law; Evans' sentence was set aside afterward. App. 13a. Our research has found no case in which such a distinction was considered dispositive of the cut-off between applying an old law or a new one.

III. THE TRIAL COURT'S INSTRUCTION TO THE JURY IN THE RESENTENCING PROCEEDING THAT THE SENTENCE OF LIFE IMPRISONMENT REQUIRED A UNANIMOUS VOTE OF THE JURY WAS CONTRARY TO THE STATUTES OF VIRGINIA AND VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

The statute relating to the unanimity of the jury in death penalty cases, provides as follows:

> "D. The verdict of the jury shall be in writing, and in one of the following forms:
>
> "(1) We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, *unanimously fix his punishment at death.*
>
> Signed _____ Foreman"
>
> or
>
> (2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, *fix his punishment at imprisonment for life.*
>
> Signed _____ Foreman"

§ 19.2-264.4(D) of the Code of Virginia, 1950, as amended (emphasis added).

The difference between the death penalty verdict form and the life imprisonment verdict form is patently clear.

For the jury to sentence a defendant to death requires a unanimous verdict. The word "unanimously" is conspicuously absent from the verdict form to be used should the jury not decide on the death sentence.

The legislative intent was clearly to omit the word "unanimously" in the life imprisonment verdict form. The maximum *expressio unius est exclusio alterius* has application here. Thus, where the word "unanimously" was used expressly in the death verdict form, its exclusion in the life imprisonment verdict form should be construed as an express omission by the legislature.

Under the law in Virginia, if the jury had been properly instructed, a lone juror who firmly believed life imprisonment rather than death was appropriate would understand that his refusal to vote for death would result in a life sentence. Under the errant instruction below, however, the holdout juror might believe that he would never be able to convince the other eleven jurors that they should vote for life rather than death. Therefore, he might vote for a death penalty out of the view that the law required unanimity one way or the other. This Court must make clear to state courts that, unless state statutes so specify, trial judges must not instruct jurors that they need to vote unanimously for a life sentence in a death penalty case.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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